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IN THE

Supreme Court of the United States

October Term, 1951 **No. 136**

JAMES W. BUTTERFIELD, Director of Immigration and Naturalization Service, Detroit, Michigan,

Petitioner,

vs.

JOHN ZYDOK,

Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Jurisdiction

The Brief for the Petitioner (p. 1) correctly sets forth the jurisdiction of this Court.

Questions Presented

(1) Whether the Attorney General abused his discretion in rearresting on October 23, 1950, respondent who had theretofore been released on $2,000 bail in deportation proceedings instituted against him, and thereafter holding him without bail on the basis of two radiograms and without legal process of any kind;

(2) Whether respondent had the right to refuse to answer questions put to him with reference to his membership in the Communist Party;

(3) Whether the respondent on such rearrest had the burden of going forward with proof that the Attorney General had abused his discretion or was such burden upon the Attorney General;

(4) Whether the respondent, an alien in a deportation proceeding, has a constitutionally protected right to bail during the pendency of such proceedings.

Statute Involved

The pertinent part of the applicable statute appears in the Brief for the Petitioner (p. 2).

Statement

The statement in the Brief for the Petitioner is accurate and satisfactory except for the following:

(1) The Brief for the Petitioner states (p. 4) that the respondent's arrest was effected on October 23, 1950 "under the outstanding warrant." There is nothing to establish that in fact it was under the warrant that the arrest was made and that his arrest and detention was not solely on the basis of the two radiograms sent by the Central Office to the District Office (Exhs. 2 and 4, R. 17).

(2) The statement of May 25, 1949—Exhibit 5—forwarded to this Court as an original exhibit (Brief for the Petitioner, footnote 2), in which respondent made certain admissions, was not properly before the district court for the following among other reasons: It was taken in the absence of counsel; respondent made the statement in the office of the Immigration and Naturalization Service, to which he had been physically transported more than a

month before the warrant of arrest issued (R. 5); he said what he did not voluntarily but because he thought that he would be released only if he admitted Communist Party membership.[1] Accordingly, questions based on Exhibit 5 and statements therein contained could not properly be relied upon to sustain the respondent's detention without bail.

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1 We quote from the stenographic record of the 1949 deportation hearing:

A. May 25, I was arrested by United States Immigration Service man. I was brought here and they gave me, to the room, supper. They was questioning me. I went for four hours or something. And then force me to sign separate blank "I member of Communist Party," and then they let me go. (p. 118)

* * *

Q. And you said you were forced to sign a statement. What do you mean you were forced to sign a statement? A. I mean—at least I thought so—if I didn't sign, you wouldn't let me go out. (p. 119)

* * *

Q. Did anyone tell you that you had to sign a statement before you could go home? A. That's right.

Q. Who told you you had to sign the statement before you could go home? A. I don't know their name but that inspector, or how they call, was questioning me.

Q. Isn't it a fact that you made that statement voluntarily and signed it in the presence of witnesses? A. I don't get that question.

The Examining Inspector: Will you read the question back?

(The question was read by the reporter.)

The Witness: No. (pp. 120-121)

* * *

The Witness: The question was did I sign that voluntarily. Voluntarily I don't sign, but they call me from other room and say, "O. K., you sign that before you go home". That is what I thought: before I sign this, I can't go home. That is why I sign it.

Q. (By the Examining Inspector) You just thought you couldn't go home? No one told you you couldn't go home? A. Yes, it was told to me, "Sign that statement. Then, O.K., you can go home."

Q. And you signed it voluntarily; is that correct? A. I won't sign if I know I got right not to sign; but I thought, "I have to sign, because they don't let me go."

Q. No one told you you had to sign it; isn't that correct?

Mrs. King: I think I am going to object to this as repetitious.

The Presiding Inspector: Well, not the last question. I will overrule the objection to the last question.

The Witness: Well, I think my question is answered.

The Examining Inspector: I want to repeat the question.

Q. (By the Examining Inspector) No one told you you had to sign the statement, did they? A. I was told, "Sign that statement. Then you can go home." (pp. 121-122)

(3) The Brief for the Petitioner alleges (p. 6) that in denying respondent's petition the district court found "that respondent's evasive demeanor on cross-examination demonstrated that he was still knowingly and wilfully participating in the Communist movement (Finding of Fact 16, R. 12)", without referring to respondent's claim to constitutional immunity from self-incrimination (R. 31-40) with reference to such Communist Party membership. This the Court of Appeals upheld (R. 93). Accordingly thereafter any references to conclusions reached by the district court on the basis of respondent's "evasive demeanor" should not have been referred to by petitioner and are not properly before this Court.

(4) The suggestion in the Brief for the Petitioner (f. 16) that there was delay in the deportation proceedings because of respondent's request for adjournment is misleading in view of the fact that respondent's case was argued before the Board of Immigration Appeals on May 17, 1951 and has not yet been decided.

ARGUMENT

I.

The Attorney General abused his discretion in rearresting respondent.

In the warrant of arrest issued June 30, 1949 (R. 5), it was specified that "Authority has been granted for release under bond in the sum of $2,000" (R. 5). Thus the Attorney General in the exercise of his discretion had fixed the bail at that figure, and in the absence of compelling proof to the contrary this should be regarded as appropriate (*Potash* v. *District Director*, 169 F. 2d 747, C. A. 2nd

Circ., 1948). In August 1949 respondent was taken into custody and released on that bail (Brief for Petitioner, p. 3). Thereafter he could not be rearrested because (1) the statute (Brief for the Petitioner, pp. 2-3) provided only for the alien to "be continued in custody"; (2) the warrant of arrest was exhausted as an arresting instrument (22 C. J. S., 482; *In re Broadhead*, 74 Kans. 401; *United States* v. *Ebbs*, 49 Fed. 149).

To have authorized rearrest, a new warrant should have been issued, *cf.* companion case of *Carlson* v. *United States*, Docket No. 35, R. 44 and 47, *Ex parte Sentner*, 94 F. Supp. 77, *Matter of Stess*, Civ. No. 5154, D. C., E. D., Wisc. Nov. 17, 1950, TEHAN, *J.*, unreported.

But aside from these technicalities, the Attorney General had already exercised his discretion and rearrest and detention without bail of the same non-citizen in the absence of any additional facts but merely upon the basis of enactment of a statute was not the exercise but the abuse of discretion.[2]

On or about October 23, 1950, some fifty non-citizens were taken into custody and held without bail on instructions received by radiogram from the Central Office of the Immigration and Naturalization Service to the effect that they should be arrested and detained under and pursuant to Section 23 of the Internal Security Act of 1950. Since then all such non-citizens have been released.[3]

In these cases the facts were substantially the same. In each instance the non-citizen, like the respondent, had been

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2 The Brief for the Petitioner (p. 13) places great emphasis on the *Wong Wing* case. Neither that case nor the dictum quoted from it purports to justify detention without the allowance of bail in a deportation case. Enlargement on bail is no less detention; it merely transfers custody from the Immigration Service to the surety. (*Taylor* v. *Taintor*, 16 Wall. 366, 371.)

3 The last to be released were Carlson et al. released by this Court, April 30, 1951 (341 U. S. 918) pending the granting of their certiorari petition.

arrested under a warrant charging him with being deportable under the Act of October 16, 1918 as amended (8 U. S. C. §137) and in almost every instance because he was or had been a member of the Communist Party. In each instance the non-citizen, like the respondent, had been released under bond in varying amounts conditioned upon his appearing for hearing or hearings or for deportation. In each instance the non-citizen, like the respondent, was rearrested on instructions from the Central Office of the Immigration and Naturalization Service and without any additional warrant or other document authorizing detention.

In each of the instances exclusive of the four non-citizens involved in *Carlson et al.* v. *United States* (Docket No. 35, October Term, 1951), the court held the Attorney General abused his discretion. We list below the various decisions on habeas corpus—information concerning which has in many instances been received merely from the attorney—and, where available, the court, date and docket number under which the decision is identified. The Service contested each release and their files will establish the accuracy of every case reported.

The names of long resident aliens against whom deportation proceedings were pending, who were released on bail by way of habeas corpus, follow:

Heikkinen v. *Gordon*, 190 F. 2d 16, C. A. 8th Cir., 1951;

Zydok v. *Butterfield*, 187 F. 2d 802, C. A. 6th Cir., 1951;

Mangaoang v. *Boyd*, 186 F. 2d 191, C. A. 9th Cir., 1950;

Klig v. *Shaughnessy*, 94 F. Supp. 157, 1950;

Ex parte Sentner, 94 F. Supp. 77, 1950;

Matter of Hilty and Stess, No. 5153 and No. 5154 U. S. D. C., E. D. Wis., Nov. 17, 1951, TEHAN, *J.*;

In re Estrada, Civ. 4125, U. S. D. C., N. D. Tex., Dallas Div., Oct. 28, 1950, ATWELL, *J.*;
Warhol v. *Shrode,* 94 F. Supp. 229;
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Schlossberg v. *Ault,* 27805, U. S. D. C., N. D. Ohio, E. Div., Nov. 20, 1950, FRIED, *J.*;
Lucas v. *Ault,* 27806, U. S. D. C., N. D. Ohio, E. Div., Nov. 20, 1950, FRIED, *J.*;
Papandreou v. *Butterfield,* 9908, U. S. D. C., E. D. Mich., S. Div., Nov. 6, 1950, LEDERLE, *J.*;
In re Yanish, No. 30114, U. S. D. C., N. D. Cal., S. Div., Oct. 26, 1950, ROCHE, *J.*;
In re Fox, No. 30115, U. S. D. C., N. D. Cal., S. Div., Oct. 26, 1950, ROCHE, *J.*;
In re Heikkila, No. 30126, U. S. D. C., N. D. Cal., S. Div., Oct. 26, 1950, ROCHE, *J.*;
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In re Sassieff, No. 2641, U. S. D. C., N. W. Wash., N. Div., BOWEN, *J.*;
In re Kemenovich, No. 9179, U. S. D. C., W. D. Pa., Nov. 1, 1950, BURNS, *J.*;
MacKay v. *Butterfield,* Civil 1220, U. S. D. C., N. D. Ind., Nov. 17, 1950, SWYGERT, *J.*

The government has recognized as it could not but do that the courts have generally ordered release. Thus in Progress Report No. 2 to the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong. 1st Sess., Mr. Stanley A.

Diana, Chief of the Detention, Deportation and Parole Section of the Immigration and Naturalization Service was quoted as having testified:

"Mr. Diana: Fifty. In all, 50 were taken into custody.

• • •

Mr. Arens: May I ask you this: Why didn't you dip down and pick up the nonleading Communist aliens?

Mr. Diana: We thought we would do this: We would first take the leading Communists, and see what determinations the courts would make in our continued detention of those cases, and as soon as we would learn of their decisions, we then would go out and pick up all that we could. However, the courts did not decide in our favor.

• • •

Mr. Diana: On October 21, 1950, the field offices were specifically instructed to take into custody immediately, and detain, all active Communists, under proceedings, and in whose cases the orders of deportation had not been outstanding for a period of more than 6 months. In all, 50 aliens were taken into custody.

One was released because of his recent and continuing cooperation. All of the other 49 applied for writs of habeas corpus, with the result that all but 5 were released by the courts. In these five cases, the aliens are appealing.

And I now understand • • • that they were recently released by the Supreme Court pending a decision on their appeal.

Mr. Arens: That is the five?

Mr. Diana: Yes." (p. 57)[4]

Prior to and since these recent arrests under the Internal Security Act, the federal courts have made it quite plain that detention of Communists without bail merely because of their political opinion or association would not be sustained:

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4 Only four (cf. Record on Appeal, Carlson et al., October Term, 1951, No. 35) went up to the Supreme Court. The fifth, Knut Heikkinen was released by the Court of Appeals for the Eighth Circuit (*supra*) and in that case the Solicitor General has applied for certiorari (Oct. Term 1951, No. 334).

Stack v. *Boyle*, U. S. Supreme Court, Docket No. 400, Nov. 5, 1951;

Potash v. *District Director*, 169 F. 2d 747, C. A. 2nd Cir., 1948;

Pirinsky v. *Shaughnessy*, 177 F. 2d 708, C. A. 2nd Cir., 1949;

Williamson v. *U. S.*, 184 F. 2d 280, C. A. 2nd Circ., JACKSON, *J.*, 1950;

Bridges v. *U. S.*, 184 F. 2d 881, C. A. 9th Circ., 1950.

II.

The respondent was improperly required to answer questions as to his Communist Party membership.

One of the main reasons for the ruling by the district court sustaining the action of the Attorney General is contained in Finding of Fact 16 (R. 12) reading as follows:

> "That the petitioner, while under cross-examination by the Chief Assistant United States Attorney, was a consistently evasive witness and his evasive demeanor in testifying in relation to his communistic activities convinces this Court that he is knowingly and wilfully participating in the Communist movement."

However, the respondent-appellee claimed his constitutional right against self-incrimination and, as the appellate court recognized, was not properly required to answer any questions as to membership or activities in the Communist Party (R. 92-3):

> "The district court seemed of the opinion that it was the duty of appellant to make such clear and convincing showing as would justify it in holding that the Attorney General or his subordinates had gone beyond the limit of sound discretion in denying bail and the court found that as a witness appellant

had ample opportunity to testify that he was not a member of the Communist Party or a part of the Communist movement at the date of his last arrest. While on the witness stand appellant claimed his conditional privilege against self-incrimination and upon that ground declined to testify touching his Communistic relations. We think that his refusal to testify should not have operated against him. *Blau* v. *United States* [340 U. S. 159], decided by the Supreme Court on Dec. 11, 1950."

See also:

Ballman v. *Fagin*, 200 U. S. 186;
Estes v. *Potter*, 183 F. 2d 865, C. A. 5th Circ., 1950, cert. denied 340 U. S. 920;
Alexander v. *U. S.*, 181 F. 2d 480, C. A. 9th Circ., 1950, cert. denied 340 U. S. 920;
U. S. v. *Weizman*, 111 F. 2d 260, 261, C. A. 2nd Circ., 1940;
U. S. v. *Zwillman*, 108 F. 2d 862, C. A. 2nd Circ., 1940.

Even without reference to respondent's right against self-incrimination it would seem most improper for the Government in a deportation case to require the non-citizen upon his preliminary application for bail to become involved in evidence concerned with Communist Party membership, the very issue upon which the deportation depends. Were the Government's contention sound, the alien would have to establish non-membership to secure release on bail in order to be free to prepare the main case on the very same issue.

As this Court stated in *Stack* v. *Boyle* (Docket No. 400, Nov. 5, 1951):

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of pun-

ishment prior to conviction. See *Hudson* v. *Parker*, 156 U. S. 277, 285 (1895)." (p. 3)

This was reiterated by Mr. Justice JACKSON in his concurring opinion, in more extended form:

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere acccusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." (p. 1)

III.

The respondent was not required to go forward with proof.

Whatever the application of the rule in the *Potash* case (*supra*) is to the original arrest and detention without bail of a non-citizen in deportation proceedings, it seems clear that where the Attorney General has already released such non-citizen on bail he must, in order thereafter to hold him without bail, make some showing of changed circumstances or of "danger to the public safety of his continued presence within the community" (169 F. 2d at 751).

In the case at bar there was no showing whatsoever of any change of circumstances. In the words of the appellate court (R. 92):

> "The record fails to disclose that he has violated any law or that he is engaged or is likely to engage in, any subversive activities."

In fact the respondent went forward with proof. The Court of Appeals summmarized the testimony in this favorable fashion (R. 92):

"Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U. S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army."

The petitioner in urging continued detention relies wholly on respondent's Communist Party membership (Brief, pp. 4-6). The previous deportation investigation and hearing had—on improper evidence to be sure—served to establish his connection with the Communist Party, but as Chief Judge Hicks wrote (R. 91-2):

"* * * If in the exercise of sound judgment upon whether appellant should have been continued in custody or have been released on bail, the Attorney General was limited to a consideration of the undisputed fact that appellant was a Communist, little may be urged against his decision in view of the preamble to the Internal Security Act of 1950. But we think that in determining whether appellant should have been granted or denied bail the Attorney General had a much wider latitude for decision.

"Discretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision in view of all the attending circumstances. *The Styria, Scopinich, Claimant* v. *Morgan*, 186 U. S. 1, 9. There are many circumstances which involve decision."

IV.

The respondent had a constitutionally protected right to bail.

The Eighth Amendment to the Constitution specifies that "excessive bail shall not be required," without limiting the statement to bail in criminal as against civil proceedings. The Solicitor General argues that this provision does not guarantee the right to bail but merely precludes "excessive bail" (Brief for the Petitioner, pp. 9-10).

Such a formulation overlooks the fact that outright denial of bail is more clearly "excessive bail" than fixing bail in however large an amount. Plainly the only reason why Congress has by statute provided that in capital cases bail is discretionary is to make clear that where the punishment for an offense is death, detention without bail does not necessarily constitute excessive bail. Whatever the rule in England may have been, or whatever the history of the bail statute in this country, it has generally been recognized that the constitutionally protected right against excessive bail guarantees not only the fixing of bail in a reasonable amount but *a fortiori* the fixing of bail. To say that the Constitution prohibits excessive bail but does not prohibit detention without bail is wholly without merit. Plainly the constitutional provision against excessive bail is designed to prevent a denial of bail.

There have been intimations in the deportation cases that the limitation of the Eighth Amendment applies to them at least in principle if not with the same precision as to criminal cases.

> *Potash* v. *District Director*, 169 F. 2d, at 752;
> *Klig* v. *Shaughnessy*, 94 F. Supp. 157, 159-60, RYAN, *J.*;
> *Cf. U. S.* v. *Motlow*, 10 F. 2nd 657, 659, C. A. 7th Circ., 1926, BUTLER, *J.*

In any event it is plain that as to both classes—those charged with crime (*Rubinstein* v. *Mulcahy*, 155 F. 2d 1002, 1004, C. A. 2nd Circ., 1946, and authorities cited) and those arrested for deportation (*Heikkinen* v. *Gordon*, 190 F. 2d 16; *Zydok* v. *Butterfield*, 187 F. 2d 802)—bail should be fixed, not as punishment but in an amount appropriate to insure the appearance of the individual when required. As Chief Judge GARDNER wrote in the *Heikkinen* case, *supra*:

> "The rules and rights of the parties in criminal and civil bail are similar in many respects" (190 F. 2d at 19).

CONCLUSION

The Court below, after a thorough study of the record now before this Court, held that (R. 93):

> "We think that a fair consideration of the factors above set out in their aggregate require that appellant should have been granted bail in some reasonable amount."

The district court thereupon released the respondent on the $2,000 bail theretofore set by the Attorney General, and Zydok has appeared whenever his presence was sought. This Court should not interfere with that disposition.

Dated: November 19, 1951.

Respectfully submitted,

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